

<b>Then v City of New York</b>
2011 NY Slip Op 31190(U)
March 25, 2011
Sup Ct, NY County
Docket Number: 113216/07
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEASED. JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 113216/2007

THEN, JENNY

INDEX NO. \_\_\_\_\_

vs

CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

Sequence Number : 004

MOTION SEQ. NO. \_\_\_\_\_

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

CAL # 128

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAR 30 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/25/11  
MAR 25 2011

Barbara Jaffe  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X

JENNY THEN,

Plaintiff,

-against-

Index No. 113216/07

Argued: 2/1/11  
Mot. Seq. No.: 004  
Cal. No.: 128

**DECISION AND ORDER**

THE CITY OF NEW YORK, and THE NEW YORK CITY  
POLICE DEPARTMENT, POLICE OFFICER ANDREW  
SHORE, AT&T AND JOHN DOES 1 to 10,

Defendants.

**FILED**

**MAR 30 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

BARBARA JAFFE, J.:

**For plaintiff:**  
Andrew M. Roher, Esq.  
Herzfeld & Rubin P.C.  
125 Broad St.  
New York, NY 10004  
212-471-8500

**For defendants:**  
Lynn M. Leopold, ACC  
Michael A. Cardozo  
Corporation Counsel  
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By notice of motion dated September 27, 2010, defendants move pursuant to CPLR 3211 and/or 3212 for an order dismissing the complaint against them. Plaintiff opposes.

I. BACKGROUND

On October 9, 2006, following an investigation by defendant Police Officer Shore, plaintiff was arrested and charged with two counts of Identity Theft in the First Degree (Penal Law 190.80[3]), Grand Larceny in the Third Degree (Penal Law 155.35), Scheme to Defraud in the Second Degree (Penal Law 190.60[1]), and Theft of Services (Penal Law 165.15[4]). On

October 10, 2006, plaintiff was arraigned and released. (Affirmation of Lynn M. Leopold, ACC, dated Sept. 27, 2010 [Leopold Aff.], Exhs. A, G).

On or about January 5, 2007, plaintiff served City with a notice of claim in which she alleged that she had been unlawfully detained and imprisoned and falsely arrested, resulting in emotional and mental anguish and physical distress. (*Id.*). On May 7, 2007, all of the criminal charges against plaintiff were dismissed on speedy trial grounds. (*Id.*, Exh. B).

On or about September 28, 2007, plaintiff served defendants with her summons and complaint, alleging as her causes of action false arrest, false imprisonment, malicious prosecution, and defamation. (*Id.*, Exh. B). On or about May 13, 2008, City defendants served an amended answer. (*Id.*, Exh. C).

On January 29, 2009, Shore testified at an examination before trial that in October 2006, he was assigned to the Organized Theft and Identity Theft Task Force within his police precinct, and that sometime in 2006, he received a telephone call from Becky Landers, a fraud investigator employed by defendant AT&T, who told him that she believed there was fraud or identity theft related to AT&T services at 306 West 112<sup>th</sup> Street in Manhattan (the premises). On September 19, 2006, he met with Landers, who told him that an unknown person at the premises had been using the personal identifiers of unknown victims since January 2009 to set up and use AT&T services with an associated total loss of \$4,148.73, and provided him with a spreadsheet listing AT&T telephone accounts opened at the premises, one belonging to Sasha Trinidad, whose service began on January 18, 2006, another to Sasha Crinydav, presumably the same person as Trinidad, whose service began on February 8, 2006, and the third to Ismael Frias Fernandez, whose service began on May 19, 2006, along with the social security numbers used to open the

accounts and the assigned phone numbers. The last telephone phone number on the list, the allegedly fraudulent number, was still active. (*Id.*, Exh.G). AT&T's records reflect that plaintiff had had an AT&T account in her name at the premises and had not paid the bill. Landers speculated that when plaintiff's account accrued charges, instead of paying the bill, plaintiff closed it and opened a new one using a new name and social security number but listing the same address, and that she had done so several times. (Leopold Aff., Exh. F).

Shore also testified that on October 3, 2006, he and another detective visited the premises and that Stephanie Guerrero, plaintiff's 14-year-old daughter, answered the door and told them that plaintiff was the only adult occupant of the apartment, from which Shore inferred that Trinidad, Crinydav, and Fernandez never lived there. Shore dialed the fraudulent telephone number and heard Guerrero answer it. He asked Guerrero to have plaintiff call him, which she did that night. According to Shore, plaintiff told him that she had been in financial trouble and wanted to switch phone carriers but could not use her own personal information due to bad credit, and was therefore using her friend's personal information for the phone service but he knew about her use and approved of it. Shore attempted to contact Fernandez and Trinidad but was unable to do so. (*Id.*).

According to Shore, on October 4, 2006, he received a telephone call from a lawyer representing plaintiff about a surrender date and time for plaintiff. On October 9, 2006, plaintiff appeared at Shore's office and was arrested. As plaintiff had retained an attorney, Shore did not ask her any questions. Shore decided to arrest plaintiff after consulting with his supervisor, and based on his conclusion that she had committed the crime of theft of services by making telephone calls without paying for them, the crime of grand larceny as her theft of services was

greater than \$3,000, and the crime of identity theft as he was unable to confirm that Fernandez or Trinidad had given plaintiff permission to use their personal information. (*Id.*).

Landers testified at a deposition held on January 29, 2009 that plaintiff had originally come to her attention when she received a call in July 2006 from an employee at the security department at Verizon who told her that many telephone bills had been discovered with large outstanding amounts at the premises address and asked if AT&T had the same issue; he also provided Landers with plaintiff's name. Landers investigated AT&T's records and discovered plaintiff's account as well as those of Crinydav, Trinidad, and Fernandez. (*Id.*, Exh. J).

At a deposition held on January 30, 2009, plaintiff testified that she began living at the premises in 1994 and the lease is in her name only, that in 2005 she married Fernandez and he lived at the premises from 2005 until the end of 2007, that Trinidad is her sister and she lived at the premises between 2003 to September 2006, and that Trinidad and Fernandez had opened AT&T accounts in their own names while they were living with her. Plaintiff received their bills and give them to Trinidad and Fernandez to pay; she did not pay their bills. She denied telling Shore that she had opened an AT&T account using a friend's personal information or that he ever asked her about the telephone accounts. Rather, Shore refused to tell her the reasons for her arrest. (*Id.*, Exh. E).

At a deposition held on March 10, 2010, Shore testified that on October 6, 2006, he received from Trinidad a typewritten letter in which she referenced a mistaken address on an income tax return and stated that in either 2004 or 2005 she had been living with plaintiff at the premises. (*Id.*, Exhs. G, H, K). Shore did not consider the documents significant; that plaintiff had received Trinidad's or Fernandez's permission to use their information was immaterial to

him. Although Trinidad provided her telephone number, Shore never attempted to contact her. (*Id.*, Exh. H).

## II. CONTENTIONS

Defendants contend that as plaintiff's arrest was based on information provided by Landers, Shore's own investigation revealing that multiple telephone accounts existed at the premises under various names, and given plaintiff's admission that she had used a friend's personal information to open an AT&T account, Shore had probable cause to believe that plaintiff had committed the crimes of identity theft, grand larceny, scheme to defraud, and theft of services, thus requiring the dismissal of plaintiff's false arrest claim. They do not address plaintiff's other claims. (*Leopold Aff.*).

Plaintiff asserts that material issues of fact exist as to Shore's reasons and justification for her arrest, and that he failed to conduct a reasonable investigation, having relied solely on plaintiff's teenage daughter's statement that only plaintiff lived at the premises, ignored Trinidad's fax, and failed to contact Trinidad to clarify matters. (*Affirmation of Andrew M. Roher, Esq., dated Nov. 18, 2010 [Roher Aff.]*). She annexes an affidavit from Trinidad, who states that she lived with plaintiff at the premises for several years through and including October 2006, during which time she had two AT&T telephone accounts at the premises, and that Shore never called her before or after she sent him her fax. She explains the misspelling of her last name on one of the accounts as resulting from the fact that she is not a native English speaker and may have been misunderstood by the AT&T employee when she opened the account. (*Id.*, *Affidavit of Sasha Trinidad, dated Oct. 21, 2010*). Plaintiff also submits Guerrero's affidavit in which she denies having told Shore that plaintiff was the only adult living at the premises. (*Id.*,

Affidavit of Stephanie Guerrero, dated Nov. 18, 2010).

In reply, defendants argue that based on the totality of the evidence, Shore conducted a reasonable investigation and had probable cause to believe that plaintiff had committed a crime, that Trinidad's and Guerrero's affidavits are self-serving, and that Trinidad's fax to Shore contains no information relevant to his investigation as it does not reference a telephone account or address whether she lived at the premises in 2006. (Reply Affirmation dated Dec. 15, 2010).

### III. ANALYSIS

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

The elements of a false arrest claim are that: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged. (*Rivera v City of New York*, 40 AD3d 334, 341 [1<sup>st</sup> Dept 2007]). A warrantless arrest gives rise to a presumption that the arrest was unlawful, and thus the plaintiff establishes, *prima facie*, a claim of false arrest upon proof that his arrest was made without a warrant. (59 NY Jur 2d, False Imprisonment § 32 [2010]). In order to avoid liability for the arrest, the defendant must then establish that he was

legally justified in effecting the arrest based on proof that at the time of the arrest, the arresting officer had probable cause to believe that the plaintiff had committed a crime. (*Id.*).

Probable cause arises when the arresting officer has reasonable or probable grounds for believing that the arrestee had committed an offense; in other words, grounds which would induce an ordinary prudent and cautious person, under the circumstances, to believe the arrested person guilty. (*Id.* § 33). Generally, information from an identified citizen accusing another individual of committing a specific crime is sufficient to provide the police with probable cause to arrest. (*Norasteh v State*, 44 AD3d 576 [1st Dept 2007], *lv denied* 10 NY3d 709 [2008]). However, “the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.” (*Colon v City of New York*, 60 NY2d 78 [1983]). Dismissal of the criminal charge is some evidence of a lack of probable cause, but it is not dispositive. (59 NY Jur 2d, False Imprisonment § 34).

“The issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn from such facts . . . where there is ‘conflicting evidence, from which reasonable persons might draw different inferences \* \* \* the question [is] for the jury.’” (*Parkin v Cornell Univ., Inc.*, 78 NY2d 523 [1991], quoting *Veras v Truth Verification Corp.*, 87 AD2d 381 [1<sup>st</sup> Dept 1982], *affd* 57 NY2d 947).

Pursuant to Penal Law 190.80(3), a person is guilty of identity theft in the first degree when he or she “knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person,” and thereby commits a Class D level or

higher felony. A person is guilty of grand larceny in the third degree when he or she steals property with a value of more than \$3,000 (Penal Law 155.35), and of a scheme to defraud in the second degree when he or she “engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property from one or more of such persons” (Penal Law 190.60[1]). And pursuant to Penal Law 165.15(4), a person is guilty of theft of services when, with the intent to avoid paying lawful charges for telephone services, he or she “obtains or attempts to obtain such service for himself or another person or avoids or attempts to avoid payment therefor by himself or another person by means of . . . any misrepresentation of fact which he knows to be false.”

Here, Landers’s information shows that plaintiff had had an AT&T account which she failed to pay, and that three other accounts were opened at the premises. Landers’s records did not, however, reflect who opened the other accounts. Thus, Landers’s information, by itself, would not have led a reasonable person to believe that plaintiff had committed a crime.

Moreover, it is undisputed that during Shore’s investigation, he never determined whether Trinidad and Fernandez were living at the premises when the accounts were opened, and he never attempted to contact Trinidad, and Guerrero denies having told Shore that plaintiff was the only adult living at the premises. Even if she did, however, he did not ask her whether any other adults were living at the premises when the other accounts were opened. Plaintiff also denies telling Shore that she had opened an account using someone else’s name and claims that he never asked her about the telephone accounts before arresting her.

Thus, given the conflicting evidence as to what information Shore had obtained prior to

arresting plaintiff as well as disputed factual issues and the inferences to be drawn therefrom, it cannot be determined, as a matter of law, that Shore had probable cause to believe that plaintiff had committed the charged offenses. (*See Burgio v Ince*, 79 AD3d 1733 [4<sup>th</sup> Dept 2010] [summary judgment denied as to plaintiff's false arrest claim as deposition testimony of witnesses contradicted defendant's version of its investigation, raising credibility issues that precluded summary dismissal]; *Sital v City of New York*, 60 AD3d 465 [1<sup>st</sup> Dept 2009], *lv denied* 13 NY3d 903 [motion denied as rational jury could conclude that officer's failure to make further inquiry was unreasonable under circumstances and evidenced lack of probable cause]; *Fausto v City of New York*, 17 AD3d 520 [2d Dept 2005] [defendants failed to establish as matter of law that they had probable cause to arrest plaintiff as there was issue of fact as to whether officer's reliance on witness's statement was justified where evidence indicated that reasonable person would have made further inquiry]; *Malone v City of Glen Falls*, 251 AD2d 838 [3d Dept 1998] [plaintiff, allegedly scheduled to work at concert, was arrested for refusing to leave concert venue; summary judgment on plaintiff's false arrest claim denied in light of factual disputes, including parties' disparate accounts of whether and to what extent officer attempted to verify plaintiff's explanation that he had legitimate reason to be at venue]; *Jimenez v City of New York*, 24 Misc 3d 1201[A], 2009 NY Slip Op 51225[U] [Sup Ct, New York County 2009] [defendant arrested plaintiff for possession of certain items; summary judgment denied as defendant did not investigate how plaintiff came to possess them or whether he was authorized to do so]).

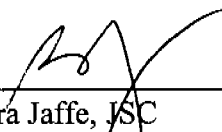
#### IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: March 25, 2011  
New York, New York

**MAR 25 2011**

**FILED**

**MAR 30 2011**

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